

Before the  
Federal Communications Commission  
Washington, D.C. 20554

ORIGINAL

In the Matter of )

Federal-State Joint Board on )  
Universal Service )

CC Docket No. 96-45

NPCR, Inc. d/b/a Nextel Partners )

Petition for Designation as an )  
Eligible Telecommunications Carrier )  
in the state of Alabama )

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Eligible Telecommunications Carrier )  
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Petition for Designation as an )  
Eligible Telecommunications Carrier )  
in the state of Georgia )

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in the Commonwealth of Pennsylvania )

Petition for Designation as an )  
Eligible Telecommunications Carrier )  
in the state of Tennessee )

Petition for Designation as an )  
Eligible Telecommunications Carrier )  
in the Commonwealth of Virginia )

Federal-State Joint Board on )  
Universal Service )

CC Docket No. 96-45

Nextel Partners of Upstate New York, Inc. )  
d/b/a Nextel Partners )

Petition for Designation as an )  
Eligible Telecommunications Carrier )  
in the state of New York )

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To: The Commission

NEXTEL PARTNERS' REPLY TO OPPOSITION TO MOTION TO STRIKE

NPCR, Inc. and Nextel Partners of Upstate New York, Inc. (hereinafter, collectively, “Nextel Partners”), by the undersigned attorneys, pursuant to Section 1.45 (c) of the Commission’s Rules, 47 C.F.R. § 1.45 (c), hereby file this Reply to the “Opposition to Motion to Strike” filed by the Rural LECs on November 23, 2004 (the “Opposition”). As discussed below, Nextel Partners’ Motion to Strike should be granted and the Rural LECs’ Application for Review should be denied.

### **BACKGROUND**

On August 25, 2004, the Wireline Competition Bureau (the “Bureau”) granted Nextel Partners’ petitions seeking designation as an ETC in seven states.<sup>1</sup> The Bureau’s Order addressed Nextel Partners’ petitions pursuant to the Commission’s *Virginia Cellular* decision.<sup>2</sup> The Rural LECs filed an Application for Review on September 24, 2004,<sup>3</sup> challenging the Bureau’s Order *solely* on the grounds that the standard set forth in the Commission’s *Virginia Cellular* order was bad policy and should be overturned, with a stay being imposed on further designations of competitive ETCs.

Nextel Partners filed its Opposition to the Application for Review<sup>4</sup> responding to the policy question presented by the Rural LECs. Nextel Partners explained that the further delays

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<sup>1</sup> *Federal-State Joint Board on Universal Service, NPCR, Inc. d/b/a Nextel Partners Petitions For Designation as an Eligible Telecommunications Carrier in the States of Alabama, Florida, Georgia, Pennsylvania, Tennessee, and Virginia, Nextel Partners of Upstate New York, Inc. d/b/a Nextel Partners Petition For Designation as an eligible Telecommunications Carrier in the State of New York*, CC Docket No. 96-45, DA 04-2667 (rel. August 25, 2004) (“Order”), amended by *Erratum* released September 13, 2004.

<sup>2</sup> *Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition For Designation as an Eligible Telecommunications Carrier for the Commonwealth of Virginia*, Memorandum Opinion and Order, CC Docket No. 96-45, 19 FCC Rcd 1563 (2004) (“*Virginia Cellular*”).

<sup>3</sup> Application for Review of the Rural Local Exchange Carriers, filed September 24, 2004.

<sup>4</sup> Nextel Partners Opposition to Application for Review, filed October 12, 2004.

sought by the Rural LECs in designating competitive ETCs would not serve the public interest and would not support development of competition and service in rural areas.<sup>5</sup> Nextel Partners demonstrated further that the Commission is bound by its existing policy and precedent and therefore cannot ignore the recently promulgated *Virginia Cellular* standard, as it would have to do to reverse the Bureau's Order.<sup>6</sup> In addition, Nextel Partners pointed out that the Rural LECs' Application for Review did not raise any question for review concerning the public interest findings of the Bureau or whether the Bureau properly applied the *Virginia Cellular* test in granting Nextel Partners' petitions.

In their Reply to Nextel Partners' Opposition,<sup>7</sup> the Rural LECs attempted to raise, *for the first time*, a challenge to the specific public interest findings made by the Bureau in designating Nextel Partners as an ETC under the *Virginia Cellular* standard. In response, Nextel Partners filed a Motion to Strike the Rural LECs' Reply<sup>8</sup> as an untimely and unauthorized supplement insofar as it sought to add a new question for review beyond the 30-day period established in

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<sup>5</sup> See Opposition at pp. 4-6.

<sup>6</sup> See Opposition to Application for Review at pp. 6-8. Moreover, the Commission should take notice that subsequent to the date Nextel Partners filed its Opposition to Application for Review, the Bureau issued two additional orders granting ETC designations to other parties. See *In the Matter of Federal-State Joint Board on Universal Service, ALLTEL Communications, Inc. Petitions for Designation as an Eligible Telecommunications Carrier in the states of Florida, Georgia, North Carolina and Virginia*, 2004 FCC Lexis 5457 (September 24, 2004); *In the Matter of Federal-State Joint Board on Universal Service, Advantage Cellular Communications, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the State of Tennessee*, 2004 FCC Lexis 6018 (October 22, 2004). It appears that these grants have not been challenged but instead have now become final orders no longer subject to Commission review. Since these grants are no longer subject to Commission review they cannot be stayed or undone based on a change in the *Virginia Cellular* standard as requested by the Rural LECs. It would therefore be arbitrary and capricious for the Commission to stay or reverse the Bureau's grant of ETC designation to Nextel Partners, which preceded the grants to ALLTEL and Advantage, based on the policy arguments raised in the Application for Review.

<sup>7</sup> Reply to Opposition to Application for Review, filed October 27, 2004.

<sup>8</sup> Nextel Partners' Motion to Strike, filed November 8, 2004.

section 1.115 (d) of the Commission's rules. The Rural LECs filed their Opposition to Motion to Strike on November 23, 2004 and Nextel Partners now files this "Reply to Opposition to Motion to Strike."

**1. The Rural LECs' Reply Must be Stricken as an Late-Filed Supplement.**

In their Opposition to Motion to Strike, the Rural LECs acknowledge that their Application for Review did not raise any challenge to the public interest findings made in the Bureau's Order designating Nextel Partners as an ETC.<sup>9</sup> The Rural LECs contend nonetheless that they were justified in attempting to raise in their Reply a belated challenge to the Bureau's public interest findings on the basis that Nextel Partners mentioned those findings in its Opposition to Application for Review. The Rural LECs' contention is without merit and must be rejected.

Nextel Partners' Opposition to the Application for Review noted the Bureau's public interest findings solely in the context of highlighting that the Application for Review did *not* challenge those findings and did *not* present any issue as to whether the Bureau's Order properly applied the *Virginia Cellular* test. A party submitting an application for review does not have the right to add a wholly new question for review beyond the 30-day period specified in section 1.115 (d) of the rules simply because an opposing party highlights the fact that the question at issue was outside the scope of the application for review as submitted, and there is no Commission precedent or authority that might suggest otherwise.

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<sup>9</sup> Opposition to Motion to Strike at p. 2, acknowledging that the issue of whether or not the Bureau's grant of ETC designation to Nextel Partners complies with the *Virginia Cellular* order is "not highlighted in the Application for Review."

Section 1.115 (b) (1) of the Commission's rules requires that an "application for review shall concisely and plainly state the questions presented for review."<sup>10</sup> As noted above, the only question presented for review by the Rural LECs in their Application for Review involved the policy issue of whether the Commission should overturn the *Virginia Cellular* test and declare a moratorium on the designation of any competitive ETCs. Section 1.115 (b) (2) of the Commission's rules lists five factors that warrant an Application for Review.<sup>11</sup> Of the five factors listed, the only one discussed in the Application for Review is the third one, involving "application of a precedent or policy which should be overturned or revised." The Rural LECs did not contend that the Bureau's Order conflicts with Commission precedent, or that the Order made erroneous findings of material facts, or even that there were any prejudicial procedural errors.

Indeed, the Rural LECs stated up front in their summary in the Application for Review that they were "[s]etting aside ... concerns about the Bureau's application of the *Virginia Cellular* standards to the Nextel ETC Petitions," and instead were seeking review only on the policy issue of whether the Commission should continue to allow grant of ETC designations "pursuant to the *Virginia Cellular* standards now that the Joint Board has issued a Recommended Decision and the Commission has sought and received comments on the Joint Board's proposals

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<sup>10</sup> 47 C.F.R. § 1.115 (b) (1).

<sup>11</sup> 47 C.F.R. § 1.115 (b) (2) mandates: "[T]he application for review shall specify with particularity, from among the following, the factor(s) which warrant Commission consideration of the questions presented: (i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy. (ii) The action involves a question of law or policy which has not previously been resolved by the Commission. (iii) The action involves application of a precedent or policy which should be overturned or revised. (iv) An erroneous finding as to an important or material question of fact. (v) Prejudicial procedural error."

to modify the ETC designation procedures.”<sup>12</sup> Nextel Partners’ Opposition to Application for Review simply reiterated what the Rural LECs themselves had stated, i.e, that the Application for Review did not challenge the public interest findings of the Bureau but only sought review based on the “policy” issue of whether *Virginia Cellular* should be overturned.

As noted above, the Rural LECs’ attempt through their Application for Review to stay the designation of Nextel Partners as an ETC is procedurally defective and unsupported by law.<sup>13</sup> Likewise, the Rural LECs’ belated attempt to bring a direct challenge to the Bureau’s public interest findings is also procedurally defective as demonstrated in Nextel Partners’ Motion to Strike. The case precedent cited by the Rural LECs in support of their Opposition to the Motion to Strike does not support their position. In *Applications of the New Continental Broadcasting Co.*,<sup>14</sup> which involved a Motion to Reopen the Record *and* to Enlarge the Issues of a proceeding involving competing applications, the Commission allowed the movant, New Continental to submit new evidence in its reply pleading in support of the Motion to Reopen that was directly responsive to arguments raised by the fellow applicant RAB in its Opposition to the Motion to Reopen. That new evidence, however, went to the very issue presented in the original Motion to Reopen the Record, i.e., whether fellow applicant RAB had forged signatures on two affidavits. The Commission did not, however, grant New Continental’s Motion to Enlarge Issues and specifically denied New Continental’s attempt to add a new issue to the proceeding regarding a misrepresentation or lack of candor issue against RAB based on the alleged forgeries.<sup>15</sup>

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<sup>12</sup> Application for Review at p. i.

<sup>13</sup> See fn. 6, above, and accompanying text.

<sup>14</sup> 93 FCC2d 1275, 1281 (1983).

<sup>15</sup> *Id.*

The other cases cited by the Rural LECs are similarly inapposite. For example, in *Alden CATV, Inc.*,<sup>16</sup> the Commission allowed a party petitioning for special relief to submit new evidence in a reply pleading that *clarified* assertions the party had made in an earlier pleading and directly responded to the criticisms raised by an opposing party in response to the earlier pleading. The Commission did not however allow the petitioner to add any new issues for review in the special relief proceeding. Further, while *DeSoto Broadcasting, Inc.*,<sup>17</sup> a Memorandum Opinion and Order by the Deputy Chief of the Cable Services Bureau in a modification proceeding, allowed the introduction of new evidence in a Reply pursuant to section 1.45 (b) that directly responded to arguments raised in oppositions, this case does not support the proposition that section 1.115 governing Applications for Review allows supplementing of an Application for Review with the addition of new questions initially presented for review beyond the 30-day period specified in section 1.115 (d). Similarly, in *KQED, Inc.*,<sup>18</sup> the Commission allowed the introduction of new factual information in a reply under section 1.45 (b) that responded to factual issues raised in an opposition, however the Commission did not allow the addition of new questions presented for review.

In the instant case, the Rural LECs' belated attempt in their Reply to challenge the Bureau's public interest findings is not a legitimate response to the issues raised in the Opposition, but is instead an attempt to raise a new question for review that was not included in their Application for Review. As such, the Rural LECs' Reply must be stricken as an unauthorized and late-filed supplement that is prohibited by section 1.115 (d).

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<sup>16</sup> 65 FCC 2d 787 (1977).

<sup>17</sup> 13 FCC Rcd 2769, 2781 (1998).

<sup>18</sup> 88 FCC 2d 1159, 1167 n.12 (1982).

## **2. Even if Considered, the Rural LECs' "Public Interest" Argument Lacks Merit.**

Finally, even assuming *arguendo* that the Rural LECs could somehow circumvent the requirements of section 1.115 (d) of the Commission's rules and belatedly add a new question for review to their Application for Review concerning whether the Bureau's Order properly applied the *Virginia Cellular* public interest test, the Rural LECs simply have not met their burden on this issue. All they have stated in support of their contention are the bald assertions that, "Nextel Partners does not meet the *Virginia Cellular* standard for ETC designation,"<sup>19</sup> and that, "Nextel Partners has not established its capability (and, frankly, its commitment) to provide supported services throughout the designated service areas."<sup>20</sup> These bald assertions are both indefinite and inaccurate, and entirely insufficient to sustain an Application for Review.<sup>21</sup> The Bureau's Order undertook rigorous and specific analysis of all of the public interest issues relevant under the *Virginia Cellular* standard, including the issues to which the Rural LECs vaguely allude in their Reply, and the Bureau correctly found that designation of Nextel Partners as an ETC is in the public interest. Nextel Partners is fully capable of meeting its obligations as an ETC and intends to do so in its designated areas with the help of the Universal Service Fund support it will receive for those areas.

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<sup>19</sup> Reply to Opposition at p. 2.

<sup>20</sup> Reply to Opposition at p. 3.

<sup>21</sup> See *Daniels Cablevision, Inc.*, 12 FCC Rcd 16594, 16599 (1997) (denying an Application for Review for failing to provide arguments or evidence to support the issues raised).



**CONCLUSION**

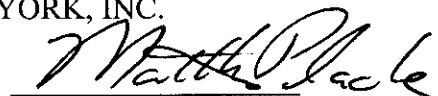
In view of the foregoing, the Commission should strike the Reply of the Rural LECs as a late-filed supplement and should deny the Application for Review.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6<sup>th</sup> day of December 2004, copies of the foregoing Reply to Opposition to Motion to Strike were sent by first-class U.S. Mail, postage prepaid, to each of the following:

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